In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1042

BETHLEHEM STEEL CORPORATION,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Bethlehem Steel Corporation, petitioner herein, prays for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is not yet officially reported, and is reproduced as Appendix A. The opinion of the Commonwealth Court of Pennsylvania is reported at 23 Pa. Cmwlth. Ct. 387, 352 A.2d 563 (1976) and is reproduced as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on November 24, 1976. A timely application for reargument was filed by petitioner on December 8, 1976 and was denied by the Supreme Court of Pennsylvania on January 3, 1977. (Appendix C) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTION PRESENTED FOR REVIEW

Whether the subjection of petitioner to simultaneous state court proceedings to enforce an administrative order at the very time that proceedings to modify the order are pending in the administrative process, in accordance with the express terms of the order, violates petitioner's Fourteenth Amendment right to due process of law when enforcement of the unmodified order will require petitioner to take costly and irrevocable action which could be rendered moot by modification of the order in the administrative process.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The relevant provision of the United States Constitution is reproduced as Appendix D.

Section 10(a) of the Pennsylvania Air Pollution Control Act, 35 P.S. §4010(a), is reproduced as Appendix E.

STATEMENT OF THE CASE

In this action the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), purported to invoke the subject matter jurisdiction of the Commonwealth Court of Pennsylvania by filing in that Court a petition for enforcement of an administrative order concerning the operation of petitioner's by-product coke ovens in Bethlehem and Johnstown, Pennsylvania. In its petition, the DER premised the jurisdiction of the Commonwealth Court on Section 10(a) of the PENNSYLVANIA AIR POLLUTION CONTROL ACT, Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4010(a) (the "Act").

Bethlehem filed preliminary objections to the DER's petition. In summary, the objections urged dismissal of the petition on the grounds that Section 10(a) of the Act confers

subject matter jurisdiction on the Commonwealth Court only over final orders of the DER from which no timely appeal has been taken or which have been sustained on appeal; that the administrative order in question was not a final order of the DER subject to enforcement under Section 10(a); that extensive proceedings to modify the abatement plans under the order, in accordance with its clear, specific and unambiguous language, are pending before the Pennsylvania Environmental Hearing Board ("EHB") from which an appeal may thereafter be taken to the Commonwealth Court; and that the DER's attempt to invoke the jurisdiction of the Commonwealth Court under Section 10(a) of the Act is not authorized by that Section and constitutes a deliberate attempt to subject Bethlehem to simultaneous proceedings in separate forums. Inherent and implicit in Bethlehem's preliminary objections is Bethlehem's contention that failure to dismiss the petition would violate Bethlehem's constitutional right to due process of law.

The following is a detailed summary of the proceedings which have given rise to this petition.

1. Following lengthy negotiations between the DER and petitioner, the parties executed Air Pollution Abatement Order No. 72-533 on February 25, 1972 concerning the emissions at petitioner's Coke Oven Batteries in Johnstown and Bethlehem, Pennsylvania.

2. Order No. 72-533, as implemented by petitioner's DER-Approved Air Pollution Abatement Plans of June 29, 1973, contemplated, among other things, that Franklin Coke Oven Battery No. 17 at the Johnstown Plant would be taken out of operation by May 31, 1975 and that petitioner would submit an application for a permit to construct equipment to control pushing emissions at Coke Oven Battery No. 5 at the Bethlehem Plant by March 1, 1975.

3. In recognition that the order was one of the first of its kind, that the air pollution control measures required to attain the final standard thereunder were untried and unproven, and that the order might require modification, paragraph 9 thereof expressly granted to petitioner the right to apply to the DER for modification of its provisions and of the plans and schedules submitted and approved thereunder. Paragraph 9 further granted petitioner the right to appeal any order, decision or other action of the DER thereon to the EHB and to the Courts of the Commonwealth of Pennsylvania.[1]

4. Acting pursuant to paragraph 9 of Order No. 72-533, on September 17, 1973 petitioner submitted an application for amendment of the Air Pollution Abatement Plan applicable to Franklin Coke Oven Battery No. 17 at the Johnstown Plant. Petitioner's request was formally denied by the DER on February 18, 1975 and, again acting pursuant to the terms of paragraph 9 of Order No. 72-533, petitioner filed a timely appeal from that denial.

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[1]Paragraph 9 of the order provides as follows:

"9. Upon application of Bethlehem Steel Corporation the provisions of this order, and plans and schedules submitted and approved hereunder, may be modified by the Department, when

"A. delivery or installation of equipment is delayed by events not in the control of Bethlehem Steel Corporation;

"B. revision of the plans and schedules submitted or approved is necessary to incorporate changes in technology or corporate planning to achieve within the time specified in paragraph 5 hereof, significant improvement in air pollution control; or

"C. air pollution control standards applicable to the by-product, slot-type coke ovens are changed.

"Any order, decision or other action taken by the Department upon such application may be appealed to the Environmental Hearing Board and the courts of the Commonwealth as provided by law."

5. With respect to the Coke Oven Batteries at its plant in Bethlehem, Pennsylvania, petitioner's original Air Pollution Abatement Plan of June 29, 1973 provided, in part, that an application for a permit to construct equipment to control pushing emissions at Coke Oven Battery No. 5 would be submitted to the DER by March 1, 1975.

6. After further negotiations, by letter dated May 13, 1975 which was delivered to the DER on May 15, 1975, petitioner submitted to the DER proposed modifications of its original Air Pollution Abatement Plan for the Coke Oven Batteries at the Johnstown and Bethlehem Plants. In essence, these proposed modifications contemplated continued operation of the Coke Oven Batteries at both plants with proposed pollution control systems.

7. By letters dated June 16, 1975, the DER denied petitioner's request for modification of the Abatement Plans for the Franklin and Bethlehem Coke Oven Batteries. On June 27, 1975, pursuant to paragraph 9 of Order No. 72-533, petitioner filed timely appeals from those denials to the EHB. The appeal concerning the proposed amendment to the Air Pollution Abatement Plan for the Bethlehem Plant is pending at EHB Docket No. 75-154-D and the appeal concerning the Franklin Batteries is pending at EHB Docket No. 75-155-D.

8. Notwithstanding the pendency of those proceedings before the EHB, on or about July 25, 1975 the DER filed a petition to enforce Order No. 72-533 in the Commonwealth Court. Petitioner filed preliminary objections to the DER's petition on jurisdictional and other grounds.

9. On February 18, 1976 the Commonwealth Court filed an opinion and order overruling petitioner's preliminary objections but noting that the case presented an unusual situation of potential conflict between the Court and the EHB (Appendix B).

10. An appeal was taken to the Supreme Court of Pennsylvania from the Commonwealth Court's February 18, 1976 order. Petitioner again argued that the Commonwealth Court was without jurisdiction over the proceeding filed by the DER pending resolution of appeals filed pursuant to the very orders sought to be enforced.

11. On November 24, 1976, the Supreme Court issued an opinion and order affirming the decision of the Commonwealth Court (Appendix A). On December 8, 1976, petitioner filed an application for reargument which was denied by the Court on January 3, 1977.

REASONS FOR GRANTING THE WRIT

The instant proceeding is an important one because it involves the extent to which a state may subject a defendant to the burden of an enforcement action with attendant costs and the potential for an irrevocable loss while the very order sought to be enforced is the subject of an appeal taken in accordance with its express terms. Petitioner and the DER agreed to the terms of the consent order which, in paragraph 9 thereof, expressly permits the appeal of a denial by the DER of an application for modification. Having so agreed, the State denied petitioner due process by attempting to enforce against petitioner an order requiring substantial irrevocable action during the pendency of proceedings in the administrative process which the DER acknowledges may result in the modification of that order.

Due process is denied where the procedure enforced by a state tends to shock the sense of fair play. *Galvan v. Press*, 347 U.S. 522, *reh. denied*, 348 U.S. 852 (1954); *Howard v. United States*, 372 F.2d 294 (9th Cir. 1967), *cert. denied*, 388 U.S. 915 (1967). This rule is uniquely applicable to this case where, after agreeing to a procedure which expressly granted petitioner the right to seek modification of the

order, the DER unreasonably subjected petitioner to an enforcement action which could well be moot upon resolution of the pending modification proceedings before the EHB.

Due process requires that a state, once it permits appellate review, must provide open and equal access to the appellate process. *In Re Brown*, 439 F.2d 47 (3rd Cir. 1971); *Robinson v. Beto*, 426 F.2d 797 (5th Cir. 1970). In this case, the state granted access to appellate review in its agreement with petitioner, but ignored that agreement when it filed an enforcement action during the pendency of petitioner's appeal. Having agreed that an appeal could be taken, the state cannot constitutionally impede petitioner's open and equal access to the appellate courts by simultaneously prosecuting an action to enforce the terms of the very order which expressly permits the appeal taken.

CONCLUSION

Petitioner submits that the subjection of petitioner to simultaneous state court proceedings to enforce an administrative order at the very time that proceedings to modify the order are pending in the administrative process, in accordance with the order's express terms, violates petitioner's Fourteenth Amendment right to due process of law when enforcement of the unmodified order will require petitioner to take costly and irrevocable action which could be rendered moot by modification of the order in the administrative process.

Respectfully submitted,

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SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES
V.
BETHLEHEM STEEL CORPORATION,
Appellant

No. 5
May Term, 1977

ORDER

AND Now, this 24th day of November, 1976, it is ordered as follows:

..X.. Order Affirmed.

..... Order Reversed.

..... Order Vacated and lower court directed to proceed in accordance with opinion filed herewith.

..... Order Modified as set forth in opinion filed herewith.

..... Ordered as set forth in opinion filed herewith.

BY THE COURT:

./s/.....
Deputy Prothonotary

NOTE: Unless another date is hereinafter set forth, the foregoing order was entered on the docket on the date set forth above.

Order entered: .....

IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES

V.

BETHLEHEM STEEL CORPORATION,

Appellant

No. 5
May Term, 1977

Appeal from an Order of the Commonwealth Court at No. 1054 C.D. 1975 on original jurisdiction.

OPINION OF THE COURT

Filed: November 24, 1976

ROBERTS, *J.*

This is an appeal from an order of the Commonwealth Court overruling preliminary objections of the Bethlehem Steel Corporation (Bethlehem) to the petition of the Department of Environmental Resources (DER) seeking enforcement of a consent order.[1] The order provides that, in certain circumstances, Bethlehem may apply to DER for modification, and that any action taken on such an application can be appealed to the Environmental Hearing Board (EHB) and the courts. The question before us today is whether the Commonwealth Court has jurisdiction to entertain an action for enforcement of the consent order during the pendency of an appeal from DER's decision to

[1] *Commonwealth of Pennsylvania, Department of Environmental Resources v. Bethlehem Steel Corporation*, ___ Pa. Commonwealth Ct. ___, 352 A.2d 563 (1976).

deny an application for modification.[2] We conclude that it does, and affirm.

[2] This Court has jurisdiction pursuant to the Act of March 5, 1925, P.L. 23, §1, 12 P.S. §672 (1962), which provides for appeal from preliminary determinations on questions of jurisdiction as if those determinations were final judgments.

DER brought this action pursuant to section 10(a) of the Air Pollution Control Act, Act of October 26, 1972, P.L. 989, §10, 35 P.S. §4010(a) (Supp. 1976), which confers jurisdiction on the Commonwealth Court for enforcement of orders "from which no timely appeal has been taken or which has been sustained on appeal." Bethlehem contends that section 10(a) does not confer jurisdiction to enforce this order during the pendency of its appeal of DER's rejection of its application for modification.

In support of its claim that the Commonwealth Court does not have jurisdiction, Bethlehem advances arguments based on the doctrines of primary jurisdiction, exhaustion of administrative remedies, and ripeness for review.

These questions may not be jurisdictional in the strictest sense; they involve issues the courts may have power to decide, but refrain from deciding until after the agency has had an opportunity to take action on the matter. See 3 K. Davis, Administrative Law Treatise §19.01 (1958) (primary jurisdiction) [hereinafter cited as Davis]. "Court jurisdiction is not thereby ousted, but only postponed." *United States v. Philadelphia National Bank*, 374 U.S. 321, 353, 83 S. Ct. 1715, 1717 (1963) (primary jurisdiction); cf. 3 Davis, supra at 2 n.7 (when the doctrine of exhaustion of administrative remedies applies "judicial interference is withheld until the administrative process has run its course.").

On the other hand, these doctrines do relate to the relative competency of the courts and administrative agencies to make an initial determination, and relate to whether the court will reach the merits of the case. See *Studio Theaters, Inc. v. Washington*, 418 Pa. 73, 209 A.2d 802 (1965).

We need not determine whether these doctrines are questions of jurisdiction within the meaning of 12 P.S. §672 (1962). Bethlehem contends that these doctrines apply because of the possibility that the order will be modified as a result of the appeals pending before the EHB. As such, Bethlehem's arguments that jurisdiction should be withheld pending further administrative action essentially amount to an argument that the order should not be treated as final, i.e., not one "from which no timely appeal has been taken" within the meaning of section 10(a) of the Air

(continued)

I.

The consent order is an air pollution abatement order agreed to by DER and Bethlehem, after extensive negotiations, on February 25, 1972. DER approved air pollution abatement plans submitted by Bethlehem to implement the order. These plans required Bethlehem to cease operation of its Franklin Coke Oven Battery No. 17 at its Johnstown Plant by May 31, 1975. Bethlehem also was required to submit an application for a permit to construct equipment to control emissions at Coke Oven Battery No. 5 at its Bethlehem Plant by March 1, 1975.

By the terms of the consent order, Bethlehem is entitled to apply for modification of the order or the modification plans in certain circumstances. If DER rejects the application for modification, Bethlehem may appeal to the EHB and the courts.[3] On September 17, 1973, Bethlehem applied for an extension of time to continue operating Franklin Coke

Pollution Control Act. Thus the doctrines of primary jurisdiction, exhaustion and ripeness as presented in this case, cannot be separate from the question of the applicability of section 10(a) of the Air Pollution Control Act.

[3] Paragraph 9 of the order reads:

> "9. Upon application of Bethlehem Steel Corporation the provisions of this order, and plans and schedules submitted and approved hereunder, may be modified by the Department, when
>
> A. delivery or installation of equipment is delayed by events not in the control of Bethlehem Steel Corporation;
>
> B. revision of the plans and schedules submitted or approved is necessary to incorporate changes in technology or corporate planning to achieve within the time specified in paragraph 5 hereof, significant improvement in air pollution control; or
>
> C. air pollution control standards applicable to the by-product, slot-type coke ovens are changed.
>
> Any order, decision or other action taken by the Department upon such application may be appealed to the Environmental Hearing Board and the courts of the Commonwealth as provided by law."

Oven Battery No. 17 at its Johnstown Plant beyond the scheduled termination date. DER denied this application on February 18, 1975, and Bethlehem appealed to the EHB.

In the meantime, Bethlehem adopted a change in corporate planning which called for continued operation of the Franklin Coke Oven Batteries, and efforts were made to negotiate a resolution of the differences between Bethlehem and DER. Bethlehem also applied for an extension of time for compliance with the plans relating to Coke Oven Battery No. 5 at its Bethlehem Plant. DER denied this application on March 6, 1975.

On May 15, 1975, after further negotiations, Bethlehem submitted to DER proposed modifications of the original abatement plans applicable to both the Coke Oven Battery No. 5 at its Bethlehem Plant and to the Franklin Coke Oven Battery No. 17 at its Johnstown Plant. As this application superseded its earlier application, Bethlehem stipulated to dismissal of the earlier appeal pending before the EHB. On June 16, 1975, DER denied Bethlehem's latest requests for modification, and Bethlehem's appeal to the EHB from this denial is still pending.

Finally, on July 25, 1975, DER filed a petition to enforce the consent order in the Commonwealth Court. Bethlehem filed preliminary objections, raising jurisdictional questions, which were overruled by the Commonwealth Court.

II.

A. DER's petition to enforce the order was brought pursuant to section 10(a) of the Air Pollution Control Act.[4] This section authorizes petition to enforce a DER order "from which no timely appeal has been taken or which has

[4] 35 P.S. §4010(a) (Supp. 1976).

been sustained on appeal."[5] Since the order DER seeks to enforce was reached by consent of the parties it is an order "from which no timely appeal has been taken" and therefore is enforceable in the Commonwealth Court.

Bethlehem insists that the order cannot be enforced in the Commonwealth Court pending the outcome of its appeal of DER's denial of its application to modify the order. But it is the DER decision not to modify the order, rather than the order itself, which Bethlehem has appealed to the EHB. The original air pollution abatement order remains in effect, and is still an order from which no timely appeal has been taken. Therefore, DER can still bring an action to enforce the original order pursuant to section 10(a) of the Air Pollution Control Act.

B. Looking only at the language of section 10(a), it might be argued that an appeal from a decision denying modification of an order is an appeal from the order itself, so as to deprive the Commonwealth Court of jurisdiction. Such an interpretation, however, would be totally inconsistent with the purpose of section 10(a).[6]

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[5]Section 10(a) provides:

> "The Attorney General, at the request of the department, may initiate, by petition, in the Commonwealth Court or the court of common pleas of the county in which the defendant resides or has its place of business, an action for the enforcement of any order issued pursuant to this act by the department from which no timely appeal has been taken or which has been sustained on appeal. The court, in such proceeding, shall have the power to grant such temporary relief as it deems just and proper and if, after hearing, the court finds that such order has not been fully complied with, the court shall enforce such order by requiring immediate and full compliance therewith. The Commonwealth shall not be required to furnish bond or other security in any proceeding instituted under this subsection."

[6]The purpose of all statutory interpretation is to give effect to the intent of the Legislature. Where the words of a statute are not free from ambiguity they are interpreted in light of the overall purpose of the statute. Act of November 25, 1970, P.L. 1339, §3, 1 P.S. §1921 (Supp. 1976); see *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 329 A.2d 812 (1974).

Section 10(a) of the Air Pollution Control Act must be construed in accordance with the purposes of the Act.[7] The Act's purposes include the "protection of public health, safety and well-being of [the] citizens . . . ."[8] This declaration of policy, adopted in 1968, replaced an earlier declaration that air resources be maintained within the limits of technological feasibility and economic reasonableness.[9] This change

> ". . . disclos[es] a market shift from combating air pollution within limitations of technical feasibility and economic reasonableness to protection not only of the air resource itself, but also of the public health, property and recreational resources of the Commonwealth."

Rushton Mining Co. v. Commonwealth, 16 Pa. Commonwealth Ct. 135, 140, 328 A.2d 185, 188 (1974).

We conclude that the adoption of the Air Pollution Control Act makes the preservation of the quality of our air resources a matter of the highest public importance.[10]

In keeping with this policy, the Legislature adopted procedures to facilitate enforceability of the Act. A variety of means of enforcement are provided, including the enforcement of administrative orders, direct proceedings in court for injunctive relief or civil penalties, and action brought by district attorneys or members of the general public.[11] Emergency enforcement powers are also granted.[12] Moreover, the Legislature restricted the

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[7]35 P.S. §§4001 et seq. (Supp. 1976).

[8]35 P.S. §4002 (Supp. 1976).

[9]Act of June 12, 1968, P.L. 163, No. 92, §1, amending Act of January 8, 1960, P.L. (1959) 2119, §2, 35 P.S. §4002 (Supp. 1976).

[10]This policy also stems from the Pennsylvania Constitution: "The people have a right to clean air . . . ." Pa. Const. art I, §27 (Supp. 1976).

[11]35 P.S. §4008-10 (Supp. 1976).

[12]Id. §4006.2 (Supp. 1976).

availability of supersedeas during administrative appeals from DER orders.[13]

C. Section 10(a) of the Air Pollution Control Act should also be interpreted in light of the statutory scheme created by the United States Congress in the Clean Air Act Amendments of 1970.[14] These amendments require the Environmental Protection Agency (EPA) to set national air quality standards.[15] The states are then required to submit plans for the implementation of these standards. These plans must be approved by the EPA if they meet eight general criteria set out in the statute. The principal criterion for federal approval is that the state plan ensure that primary air quality standards set by the EPA to protect the public health will be satisfied within three years.[16] In summary, the Clean Air Act Amendments of 1970 create a legislative scheme by which:

> "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . . ."[17]

[13]Act of December 3, 1970, P.L. 834, §20(d), 71 P.S. §510-21(d) (Supp. 1976), provides:

> "An appeal taken to the Environmental Hearing Board from a decision of the Department of Environmental Resources shall not act as a supersedeas, but, upon cause shown and where the circumstances require it, the department and/or the board shall have power to grant a supersedeas."

This section, by limiting the availability of supersedeas, reflects a policy in favor of the enforceability of DER orders. Yet this section applies only to orders which are not yet final. Although such orders are enforceable, see 35 P.S. §§4008-09, they are not subject to the provisions of section 10(a) of the Air Pollution Control Act. Clearly, an even stronger policy in favor of enforceability applies once an order becomes final.

[14]42 U.S.C.A. §§1857 et seq. (Supp. 1976).

[15]42 U.S.C.A. §1857c-4 (Supp. 1976).

[16]42 U.S.C.A. §1857c-5 (Supp. 1976). The Pennsylvania State Implementation Plan was approved in July, 1972. See 40 C.F.R. §§52.2020 et seq.

[17]42 U.S.C.A. §1857c-2(a) (Supp. 1976).

Pennsylvania's Air Pollution Control Act provides the mechanism by which the State meets its responsibilities under the Clean Air Act Amendments of 1970. Section 10(a) of the Air Pollution Control Act, provides a means for enforcing the State Implementation Plan. Thus, section 10(a) of the Act, supra, should be interpreted in accordance with the policies underlying the Clean Air Act Amendments of 1970.

Like the Pennsylvania Air Pollution Control Act, the Clean Air Act Amendments of 1970 reflect a legislative determination that air pollution constitutes a serious threat to public health and safety, and that maintaining clean air is a matter of the highest priority:

> "[T]he 1970 Amendments to the Clean Air Act were a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution."

Union Electric Co. v. EPA, ___ U.S. ___, ___, 96 S. Ct. 2518, 2525 (1976). The importance of achieving air quality standards is reflected by the expedited timetable set for EPA and state compliance[18] and by Congress' determination that achieving air quality standards should take priority over economic and technical considerations. As the Supreme Court recently explained:

> "Section 110(a)(2)(A)'s three-year deadline for achieving primary air quality standards is central to the Amendments' regulatory scheme and, as both the language and the legislative history of the requirement make clear, it leaves no room for claims of technological or economic infeasibility."

[18]EPA was required to set air quality standards within 90 days. 42 U.S.C.A. §1857c-4 (Supp. 1976). State plans for implementation of these standards were to be submitted within nine months after the air quality standards were set, and approved by the EPA within four months after submission. 42 U.S.C.A. §1857c-5 (Supp. 1976). Among the requirements for State implementation plans was that they meet primary air quality standards within three years. 42 U.S.C.A. §1857c-5(a)(2)(A).

Id. at ___. 96 S. Ct. at 2526.[19]

Like the Pennsylvania Air Pollution Control Act, the Clean Air Act Amendments of 1970 provide for a variety of enforcement mechanisms. The primary mechanism for enforcement of the Clean Air Act is the enforcement of implementation plans by the states. In addition EPA can issue compliance orders, the violation of which carries severe monetary penalties, and bring actions for injunctive relief.[20] Citizen suits to enforce emission limitations are also encouraged.[21]

Thus, the Clean Air Act, like the Pennsylvania Air Pollution Control Act, dictates a policy in favor of the enforceability of air pollution abatement orders. We will not adopt an interpretation of section 10(a) which is not required by its language and which would deprive the courts of jurisdiction to enforce pollution abatement orders.[22] The health and safety of the public must take priority.

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[19]The Supreme Court's interpretation of the Clean Air Act Amendments of 1970 was based, in part, on a Senate Committee report that determined that public health is more important than questions of technological feasibility:

> "'Therefore, the Committee determined that existing sources of pollutants either should meet the standard of the law or be closed down . . . .' S. Rep. No. 1196, 91st Cong., 2d Sess., 2-3 (1970)."

___ U.S. at ___, 96 S. Ct. at 2526.

[20]42 U.S.C.A. §1857c-8 (Supp. 1976).

[21]42 U.S.C.A. §1857h-2 (Supp. 1976).

[22]In *Train v. Natural Resources Defense Counsel, Inc.*, ___ U.S. ___, 95 S. Ct. 1470 (1975), the Georgia State Implementation Plan was challenged because it included a variance procedure. It was argued that the variance procedure would invite litigation and thereby delay achievement of air quality standards. While the Court recognized that the procedure would invite variance applications, and that polluters would seek judicial review if their applications were denied, the Court noted:

> "This litigation, however, is carried out on the polluter's time, not the public's, for during its pendency the original regulations remain in effect, and the polluter's failure to comply may subject him to a variety of enforcement of procedures."

(continued)

D. We conclude, therefore, that the policies behind both state and federal law compel the interpretation of section 10(a) of the Pennsylvania Air Pollution Control Act suggested by a literal reading of its terms. The consent order in this Court is one "from which no timely appeal has been taken," and therefore an enforcement action may be brought in the Commonwealth Court pursuant to section 10(a). Section 10(a) provides no exception for cases where a party is seeking modification of an order and the policies expressed in both state and federal law prevent us from writing any such exception into the statute.

Bethlehem may ultimately prevail in its efforts to have the order modified, and thus could be subject to unnecessary expense if the present order is enforced. This possibility, however, would not justify the conclusion that the courts are without jurisdiction to enforce the order. Such a conclusion would leave the courts powerless to enforce the order — even where it is highly unlikely that the order will be modified and where continued pollution in violation of the order presents a serious danger to the public.[23] In effect, the mere application for an extension would operate as a stay; an applicant could continue to pollute for the period required to appeal to the EHB and the courts. Such a result would be totally at odds with the strong legislative policy expressed in both the Air Pollution Control Act and the Clean Air Act. The modification proceedings must be carried out on the polluter's time, not at the expense of the general public.[24]

Id. at ___, 95 S. Ct. at 1488.

Similarly, we believe that DER orders must remain enforceable during the pendency of modification proceedings in order to comply with the spirit of the Clean Air Act Amendments of 1970. We should not adopt a system by which litigation could be used as a tool to delay enforcement of air quality standards.

[23]Where, as here, DER has reviewed and rejected the application, it cannot be assumed that the applicant will prevail on appeal.

[24]See note 22, supra.

III.

A. In addition to its argument that section 10(a) does not apply when modification proceedings are pending, Bethlehem contends that the doctrine of election of remedies foreclose DER from invoking the jurisdiction of the Commonwealth Court. Bethlehem does not raise an election of remedies argument in the strict sense.[25] Rather, Bethlehem appears to be arguing that the order, by its terms, precludes enforcement pending the outcome of modification proceedings.[26] Bethlehem contends that by agreeing to that portion of the consent order which allows it to apply for modification, DER agreed not to enforce the order until its decisions on modification has been upheld on appeal.

We do not interpret the consent order to foreclose enforcement pending the outcome of modification proceedings. Paragraph 9 of the order only provides that the order "may be modified" by the DER, and preserves the right to appeal from its decision. It does not provide that enforcement will be stayed pending any appeals from the DER's decision. It is apparent that the purpose of this paragraph is to ensure that DER will consider Bethlehem's application, and to allow Bethlehem to appeal DER's

[25] In *Department of Environmental Resources v. Leechburg Mining Co.*, 9 Pa. Commonwealth Ct. 297, 305 A.2d 764 (1973), DER brought a claim based on a consent order along with separate claims based on the underlying violations which led the DER to seek the original order. The court limited DER to enforcement of the consent order. Assuming that the Commonwealth Court's decision can be squared with the provision in the Air Control Act that "the existence of or exercise of any remedy shall not prevent the department from exercising any other remedy . . . ." 35 P.S. §4010(c) (Supp. 1976), it does not bar this action. DER here only seeks to enforce the consent order; separate claims are not involved. See *Department of Environmental Resources v. Leechburg Mining Co.*, supra.

[26] We have some doubt whether this argument raises a question of jurisdiction. Since it might have some bearing on our interpretation of section 10(a), however, we will consider Bethlehem's argument. See note 2, supra.

decision. The paragraph was included to escape the general rule that an administrative agency's denial of a motion to reopen is not subject to judicial review, see *SEC v. Louisiana Public Service Commission*, 353 U.S. 368, 77 S. Ct. 855 (1957); *Martin Marietta Corp. v. FTC*, 376 F.2d 430 (7th Cir. 1967), not as a limitation on the DER's enforcement power. This Court is most hesitant to construe any agreement as a limitation on the DER's enforcement powers, and, in the absence of clear and specific language to the contrary, will not do so here.[27]

B. Finally, Bethlehem contends the doctrine of primary jurisdiction prevents DER from maintaining this action.[28]

[27] *Winn-Dixie Stores, Inc. v. FTC*, 377 F. Supp. 773 (M.D. Fla. 1974), is in no way inconsistent with our decision. That action was brought by Winn-Dixie to compel the FTC to modify its order. The court enjoined enforcement of the order only after it determined that Winn-Dixie was entitled to modification. The court ordered the FTC to reopen its proceedings and modify the order; thus the order could not be enforced because it was no longer valid.

The action in *Winn-Dixie* would be equivalent to a motion by Bethlehem after modification of the consent order by the EHB, to change the Commonwealth Court's enforcement decree in order to reflect the modification. See note 32 infra. Thus *Winn-Dixie* has no bearing on the enforceability of an order which is still valid.

[28] If applicable, this doctrine could effect our interpretation of section 10(a). See note 2, supra.

Bethlehem also makes arguments based on the doctrines of ripeness and exhaustion of administrative remedies. Neither doctrine is applicable here.

Under the ripeness doctrine courts will not intervene when administrative action is abstract, hypothetical, or remote. Davis, §21.01, supra. This is an enforcement action and, unless enforcement is granted, Bethlehem intends to continue operation of its Johnstown and Bethlehem plants in a manner contrary to the terms of the order DER seeks to enforce. Here the administrative action, and the possible harm to Bethlehem, is immediate and concrete.

Similarly, the doctrine of exhaustion of administrative remedies has no bearing here. When this doctrine applies, a party must pursue the administrative remedies he has against an agency before challenging its action in court. L. Jaffe, Judicial Control of Administrative Action 424 (1965). Here it is an administrative agency which is invoking the jurisdiction of the court, not a party seeking review of administrative action.

Primary jurisdiction is a flexible doctrine, designed to coordinate the work of agencies and courts; Davis. §19.01, supra at 5; L. Jaffe, Judicial Control of Administration Action 121 (1965).

> "The precise function of the doctrine of primary jurisdiction is to guide a court in determining whether the court should refrain from exercising its jurisdiction until after an administrative agency has determined some question or some aspect of some question arising in the proceeding before the court."

Davis, supra at 3. The doctrine reflects a principle:

> ". . . that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created . . . for regulating the subject matter should not be passed over."

Far East Conference v. United States, 342 U.S. 570, 574, 72 S. Ct. 492, 494 (1952). In such cases, the initial determination is left to the administrative agency both because its decision is necessary for the "protection of the integrity of the regulatory scheme." *United States v. Philadelphia National Bank*, 374 U.S. 321, 353, 83 S. Ct. 1715, 1736 (1963), and may be of "material aid" to the courts, *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 305, 93 S. Ct. 573, 582 (1973).

The doctrine of primary jurisdiction has no application here. DER, the agency with primary responsibility for enforcing the Air Pollution Control Act, is not being bypassed. Indeed, DER is the party bringing the action. Having obtained a consent order, DER has decided that enforcement is necessary. Under section 10(a) of the Act, the court's duty is to determine whether there has been compliance with the order. This duty is well within the

conventional experience of judges, and enhances, rather than interferes with, the integrity of the regulatory scheme.[29]

Bethlehem insists that the doctrine of primary jurisdiction prevents the Commonwealth Court from proceeding until the EHB has acted on its application for modification. The consent order remains valid, however, and failure to comply is unlawful.[30] Even if the proceedings before the EHB involved a timely appeal from the consent order itself, rather than an appeal from an application for modification, Bethlehem would be expected to comply with the order.[31]

This is an enforcement proceeding, based on the original consent order, not a proceeding to determine Bethlehem's right to modification. Thus, the Commonwealth Court is not being called upon to make a decision which should be decided initially by an administrative agency. Nor will enforcement decree impair the integrity of the regulatory process. A judicial determination that Bethlehem presently is not in compliance with the consent order in no way interferes with the power of the EHB or the courts to modify the order at some future date.[32] There is no

---

[29] Provisions which enable DER to obtain injunctive relief and civil penalties without first obtaining an administrative order, and which allow suits by district attorneys and members of the general public, make clear the inapplicability of the doctrine of primary jurisdiction. See, 35 P.S. §§4010(b), 4010(d), 4010(f) (Supp. 1976).

[30] 35 P.S. §4008 (Supp. 1976).

[31] See note 13, supra.

[32] The Commonwealth Court believed that a possible conflict could arise if it directed enforcement in accord with the original terms of the order and the order was subsequently modified by the EHB. The court suggested that modification of the original order could serve as a defense in any contempt proceeding. ___ Pa. Commonwealth Ct. at ___, n.4, 352 A.2d 565 n.4. No such conflict need arise, however, as the Commonwealth Court can frame its enforcement decree so as to take into account the possibility that the consent order may be modified. Assuming the court fails to do so, the better course would be to seek modification of its decree, rather than risk a contempt citation. See *Mayer & Sons v. Department of Environmental Resources*, 18 Pa. Commonwealth Ct. 85, 334 A.2d 313 (1975) (grounds which might require modification of enforcement decree no defense to contempt proceeding).

reason to stay judicial enforcement pending the decision of the EHB.

In summary, the doctrine of primary jurisdiction, and the policies underlying it, do not justify a conclusion that section 10(a) of the Air Pollution Control Act is inapplicable during the pendency of modification proceedings.

Based on the clear language of section 10(a) of the Air Pollution Control Act, and the strong legislative policy in favor of effective enforcement of air pollution control standards, we hold that the Commonwealth Court has jurisdiction over this action.

Order affirmed.

MR. JUSTICE NIX did not participate in the consideration or decision of this case.

D.E.R. v. BETHLEHEM STEEL CO., et al.
[23 Commonwealth Ct. 387, (1976).]

SYLLABUS—STATEMENT OF THE CASE.

Commonwealth of Pennsylvania, Department of Environmental Resources, Petitioner v. Bethlehem Steel Corporation & Lewis W. Foy, Chairman, Bethlehem Steel Corporation; & Thomas N. Crowley, General Manager Johnstown Plant, Bethlehem Steel Corporation; & Harold F. Miller, General Manager, Bethlehem Plant, Bethlehem Steel Corporation, Respondents.

Environmental law—Consent order—Air Pollution Control Act, Act 1960, January 8, P.L. (1959) 2119—Application to modify order—Election of remedies—Enforcement of administrative order.

1. A petition by the Department of Environmental Resources under the Air Pollution Control Act, Act 1960, January 8, P.L. (1959) 2119, to enforce an order to which all parties had agreed but with which there was no compliance within the time prescribed, is not premature or otherwise improper because the party not in compliance filed an application for modification of the order. [388-9]

2. Once the Department of Environmental Resources exhausts administrative procedures available against a polluter and has obtained an administrative consent order, it may utilized the courts to enforce the order when there is no compliance therewith. [389-90]

Submitted on briefs October 20, 1975, to President Judge BOWMAN and Judges CRUMLISH, JR., KRAMER, WILKINSON, JR., MENCER, ROGERS and BLATT.

Original jurisdiction, No. 1054 C.D. 1975, in case of Commonwealth of Pennsylvania, Department of Environmental Resources, Petitioner v. Bethlehem Steel

Corporation, Respondent. Petition for enforcement of administrative order filed in the Commonwealth Court of Pennsylvania. Respondent filed preliminary objections. Held: Preliminary objections overruled.

Robert E. Yuhnke, Assistant Attorney General, for petitioner.

Paul A Manion, with him *Robert M. Walter, Robert W. Watson, Jr.*, and *Reed Smith Shaw & McClay*, for respondent.

OPINION OF THE COURT

Opinion by Judge Mencer, February 18, 1976:

This case is before us on the preliminary objections of Bethlehem Steel Corporation (Bethlehem) to the petition of the Department of Environmental Resources (DER) seeking enforcement of Air Pollution Abatement Order No. 72-533 (order) which resulted from a consensual agreement executed on February 25, 1972 by Bethlehem and DER. The order provides, among other things, that Bethlehem submit an application for a permit to construct equipment to control emissions of air contaminants resulting from the pushing operation at Coke Oven Battery No. 5 at its Bethlehem, Pennsylvania, plant by March 1, 1975 and that Franklin Coke Oven Battery No. 17 at Bethlehem's Johnstown, Pennsylvania, plant cease operation by May 31, 1975. Paragraph 9[1] of that same order provides that Bethlehem may seek

1. Paragraph 9 of the order reads:

> "9. Upon application of Bethlehem Steel Corporation the provisions of this order, and plans and schedules submitted and approved hereunder, may be modified by the Department, when
>
> A. delivery or installation of equipment is delayed by events not in the control of Bethlehem Steel Corporation;
>
> B. revision of the plans and schedules submitted or approved is necessary to incorporate changes in technology or

(continued)

modification of the order under certain circumstances. An application for modification of the order is now on appeal to the Environmental Hearing Board (EHB).

Bethlehem raises a question of the jurisdiction of this Court, issues of primary jurisdiction, exhaustion of administrative remedies, and ripeness for review and also pleads a demurrer. All these preliminary objections concern the effect of the pending action for modification before the EHB on a petition to enforce the order of February 25, 1972. Bethlehem urges, in effect, that by the terms of paragraph 9 an application for modification acts as a supersedeas in any action by DER to enforce the original order. We do not agree.

Bethlehem fails to recognize in its arguments that the action to enforce the order to which it agreed and the application for modification before the EHB, though based to some extent on the same factual material, are procedurally distinct.

Section 10(a) of the Air Pollution Control Act[2] authorizes petitions to enforce orders from which no timely appeal has been taken or which have been sustained on appeal. Bethlehem contends that its appeal on the modification application is in reality an appeal from the original order. If this were true, an action for enforcement would be premature. However, it is clear that Section 10(a) con-

> corporate planning to achieve within the time specified in paragraph 5 hereof, significant improvement in air pollution control; or
>
> C. air pollution control standards applicable to the by-product, slot-type coke ovens are changed.
>
> "Any order, decision or other action taken by the Department upon such application may be appealed to the Environmental Hearing Board and the courts of the Commonwealth as provided by law."

2. Act of January 8, 1960, P.L. (1959) 2119, *as amended*, 35 P.S. §4010(a).

templates by its very nature appeals from an adversary proceeding, not from a consensual agreement. Here the parties *agreed* to be legally bound, and no appeal *from the consent order* was contemplated. The order was final and binding the moment it was executed. When the time for performance had run, DER could properly petition for enforcement.[3]

We next address Bethlehem's contention that DER must elect to pursue its action either in the courts or through the administrative process. Bethlehem asserts that our decision in *Department of Environmental Resources v. Leechburg Mining Co.*, 9 Pa. Commonwealth Ct. 297, 305 A.2d 764 (1973), requiring DER to proceed against alleged polluters initially either by injunction or alternatively through the administrative process is applicable to oust this Court of jurisdiction. This argument again mistakenly assumes that the hearing on Bethlehem's modification petition is an administrative procedure to enforce the original order. In the case at bar, DER had already exhausted the administrative procedure when it obtained a consent order. As a final step along that same route, DER is seeking enforcement by this Court. This is entirely proper. The fact that the administrative process yielded a consent order rather than an adjudication by the EHB does not affect DER's ability to seek enforcement.

Properly interpreted, *Leechburg*, in fact, supports the position of DER. In *Leechburg*, preliminary objections were sustained by applying the doctrine of election of remedies on all counts *except one brought by DER to enforce a consent adjudication*. We hold that by consenting to be bound by the order of February 25, 1972, Bethlehem agreed

3. *See Commonwealth v. United States Steel Corp.*, 15 Pa. Commonwealth Ct. 184, 325 A.2d 324 (1974); *Commonwealth v. Rozman*, 10 Pa. Commonwealth Ct. 133, 309 A.2d 197 (1973).

that it would take the required actions by the deadlines imposed unless the order were modified prior to that time. Bethlehem had, and still has, a right to appeal an adverse ruling on its petition for modification, first to the EHB and subsequently to this Court. During appeals from such ruling, however, the unmodified agreement remains in force. Since the deadlines for compliance have passed and Bethlehem has not taken the action which it agreed to take, the inception of an action for enforcement is timely and proper.[4] We therefore enter the following

Order

Now, this 18th day of February, 1976, the preliminary objections of the Bethlehem Steel Corporation in the above captioned matter are overruled, and Bethlehem Steel Corporation is allowed 20 days from this date within which to file an answer to the petition of the Department of Environmental Resources.

4. We recognize that the terms of the order, which allow Bethlehem to apply to DER for modification of the order with a right to appeal any action taken on such an application to the Environmental Hearing Board (EHB), create an unusual situation. A potential conflict could arise if the court directs enforcement in accord with the original terms of the order but prior to compliance by Bethlehem the EHB modifies those terms. If such a conflict would arise, we would consider the modification to be a proper defense to a contempt proceeding brought for non-compliance with the order entered relative to the petition for enforcement.

Appendix C

SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

SALLY MRVOS
Prothonotary
J. HANIEL HENRY
Deputy Prothonotary

P. O. Box 624
Harrisburg 17108

January 6, 1976

Paul A. Manion, Esquire
P. O. Box 2009
Pittsburgh, Pa. 15230

Re: Commonwealth, Department of Environmental Resources v. Bethlehem Steel Corporation, Appellant
No. 5, May Term, 1977

Dear Mr. Manion:

This is to advise that the following Order has been endorsed on the Application for Reargument filed in the above matter:

"January 3, 1977

Petition denied.

s/ Per Curiam"

Very truly yours,

/s/
Deputy Prothonotary

cc: Robert E. Yuhnke, Esq.
cc: West Publishing Company
September 21, 1976 - ARGUED - J.278
November 24, 1976 - DECISION

UNITED STATES CONSTITUTION, Amend. 14

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AIR POLLUTION CONTROL ACT

§10(a) The Attorney General, at the request of the department, may initiate, by petition, in the Commonwealth Court or the court of common pleas of the county in which the defendant resides or has its place of business, an action for the enforcement of any order issued pursuant to this act by the department from which no timely appeal has been taken or which has been sustained on appeal. The court, in such proceeding, shall have the power to grant such temporary relief as it deems just and proper and if, after hearing, the court finds that such order has not been fully complied with, the court shall enforce such order by requiring immediate and full compliance therewith. The Commonwealth shall not be required to furnish bond or other security in any proceeding instituted under this subsection.

CERTIFICATE OF SERVICE

I, Paul A. Manion, in accordance with Rule 33(1) of the Rules of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Writ of Certiorari to the Supreme Court of Pennsylvania on all parties required to be served by mailing three copies thereof to Robert E. Yunke, Esq., Assistant Attorney General, Department of Environmental Resources, Room 505, Executive House Apartments, 101 South Second Street, Harrisburg, Pennsylvania 17120, Attorney for Respondent, by first class mail, postage prepaid, this 28th day of January, 1977.

/s/ PAUL A. MANION

In the Supreme Court of the United States

October Term, 1976
No. 76-1042

BETHLEHEM STEEL CORPORATION,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

ROBERT E. YUHNKE
Counsel for Respondent, Commonwealth of Pennsylvania Department of Environmental Resources

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COUNTER-STATEMENT OF THE CASE

This matter comes before this Court following an appeal by Bethlehem Steel Corporation ("Bethlehem") to the Pennsylvania Supreme Court from the dismissal of preliminary objections filed by Bethlehem to a petition for enforcement of administrative order filed by the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER") in the original jurisdiction of the Pennsylvania Commonwealth Court. DER petitioned for enforcement of Air Pollution Abatement Order No. 72-533 ("order") which imposes certain duties and schedules upon Bethlehem with respect to the control of emissions from by-product coke oven batteries at its Bethlehem (PA) and Johnstown plants. In its preliminary objections, Bethlehem challenged the jurisdiction of the Commonwealth Court under state law. The Commonwealth Court dismissed its objections, and Bethlehem appealed to the Pennsylvania Supreme Court pursuant to the Act of March 5, 1925, P.L. 23, §1, 12 P.S. §672, which creates a statutory exception to the rule prohibiting appeals from interlocutory orders by authorizing appeals from preliminary determinations of jurisdiction by a court of first instance. The Pennsylvania Supreme Court affirmed the Commonwealth Court and remanded for proceedings on the merits.

The entire litigation to date has been based on two pleadings: DER's petition and Bethlehem's preliminary objections. A true and correct copy of Bethlehem's preliminary objections is attached hereto and marked Appen-

dix A. Nowhere in Bethlehem's objections was any federal constitutional provision cited, asserted as a ground for objection, or in any manner alluded to. Nor did Bethlehem ever cite, or allude to any federal constitutional provision as support for its objections in its briefs or during argument to either the Commonwealth Court or the Pennsylvania Supreme Court.

DER replied noting that each of Bethlehem's preliminary objections rely upon the pendency before the Environmental Hearing Board of appeals filed from DER's denial of Bethlehem's respective applications to modify the air pollution abatement plans previously approved by DER pursuant to Order No. 72-533. In response, DER asserted as a matter of law that:

1. The mere filing of a petition to amend a final order of DER, to wit, an order from which no timely appeal has been taken or which has been sustained on appeal, does not constitute an amendment of any such final order; and

2. Taking an appeal from DER's denial of a petition to amend a final agency order does not constitute an amendment of such an order, nor does it constitute a supersedeas from such an order; and

3. The pendency of Bethlehem's appeals does not relieve Bethlehem of the obligation to comply with the duties presently imposed by Order No. 72-533 until such time as the obligations incorporated in said order are amended pursuant to such remedies as may be available to Bethlehem according to law; and

4. The pendency of said appeals does not in any manner act to modify, suspend or supersede Order No. 72-533, and does not deprive the Commonwealth Court of jurisdiction under Section 10(a) of the Air Pollution Control Act to enforce the present obligations of Order No. 72-533 as an "order issued pursuant to this Act by the department from which no timely appeal has been taken or which has been sustained on appeal" (Section 10(a), A.P.C. Act).

DER does not believe that Bethlehem's recitation of the factual history of the case in its petition for writ of certiorari is accurate or complete. Therefore, a counter-statement of the history of the negotiation between DER and Bethlehem regarding control of coke oven battery emissions at the Bethlehem (PA) and Johnstown plants is presented for the convenience of the Court.

A. Order No. 72-533 was executed by mutual agreement by Governor Shapp, DER Secretary Goddard and officers of Bethlehem on February 25, 1972, after five months of discussions. The order first states a finding by DER

> ". . . that emissions of air contaminants from the charging, coking and pushing operations of the by-product coke ovens at your coke works located in Bethlehem and Johnstown, Pennsylvania, are causing air pollution, as defined in the Air Pollution Control Act, the Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §4001, et seq., in that the emissions are in violation of the standards established under Chapter 123 of the Rules and Regulations of the Department of Environmental Resources and because these emissions are inimical to public health, safety and welfare, and unreasonably interfere with the comfortable enjoyment of life and property."

The order then establishes a schedule for compliance and a final standard by which compliance will be measured. The schedule gave Bethlehem sixteen (16) months to develop a plan for the reduction of emissions from charging, coking and pushing operations which would be designed to achieve compliance with the final standard. The schedule further allowed Bethlehem four years for the implementation of the various phases of its control plan. Compliance with the final standard at each battery was not required until four years following the date the Department determined Bethlehem's plan was likely to achieve compliance and granted its official approval. The timetables were generous because it was understood that Bethlehem would have to search Europe and Japan for control technologies and might have to develop new technology.

B. Abatement plans providing for the control of emissions during charging, coking and pushing operations and schedules for the installation of control devices at each battery were timely submitted on June 29, 1973. DER approved the plans and installation schedules for the Johnstown plant on July 23, and for the Bethlehem plant on July 24, 1973. Upon approval, the plans and schedules became incorporated into, and enforceable pursuant to the terms of the order.

C. The approved plan for the Bethlehem (PA) batteries provides that pushing emissions would first be controlled on Battery No. 5 by installation of a coke-side shed or a moveable hood. The schedule provides for the submission of an application for approval to construct a pushing emission control device by March 1, 1975. On February 28, 1975, Bethlehem requested in writing an extension of time to allow Bethlehem to consider a device to control pushing emissions different than that already approved for Battery No. 5. The extension was denied by DER because the alternate device suggested by Bethlehem, a "fog-spray hood", was not demonstrated technology and was not based on sound principles of air pollution control engineering. Despite DER's denial of Bethlehem's last-minute request for extension, no application for the previously approved devices was submitted, nor has it been received to date.

D. The approved plan for the Franklin batteries (three of the five batteries at the Johnstown plant) provided that the batteries would be removed from operation entirely, according to a phased schedule. Operation of Battery No. 17 was to have been stopped first, on May 31, 1975. The approved phase-out schedule was apparently submitted at a time when Bethlehem was planning to reduce total iron production at Johnstown. On May 6, 1974, Bethlehem announced to the Governor that it no longer intended to reduce production at Johnstown. However, at no time between May, 1974, and May 15, 1975, did Bethlehem either submit an application to modify its abatement plan for the Franklin batteries, or make any proposal to control pushing emissions at Franklin.

E. In March, 1975, the Department denied Bethlehem's requested extension on the pushing schedule for Battery No. 5 at Bethlehem (PA) and advised that immediate commitments would have to be made to control emissions at the Franklin batteries in order to avoid enforcement of the approved shut-down plan. Bethlehem made no response to DER, but rather arranged a meeting with the Governor on April 17, 1975, at which proposals

were made to install a "fog-spray" device for the control of pushing emissions at two Bethlehem (PA) batteries (Nos. 2 and 5) and the three Franklin batteries (Nos. 17, 18, 19).

F. The Governor agreed to give Bethlehem until May 15, 1975, to submit detailed engineering proposals and an application to modify the approved plans, but stated that the consent order remained in effect. The applications were received and reviewed by DER in detail. The proposed modifications were rejected on many grounds by DER on June 16, 1975. The reasons for denial include, *inter alia,* Bethlehem's (1) failure to show that any circumstances had occurred which would justify modification of the abatement plans in accordance with the terms of paragraph 9 of the order, (2) the substitution of an untested experimental control device which Bethlehem could not demonstrate would achieve compliance with emission limitations in place of the previously approved control device which had been proven elsewhere, (3) failure to design the device to comply with DER regulations requiring the ability to measure emissions once the device is installed, and (4) failure to demonstrate that the device would not interfere with attainment of the national ambient air standards.

G. Concurrent with its denial of Bethlehem's applications to modify the abatement plans, DER by letter from Secretary Goddard to Bethlehem's Chairman Foy, requested Bethlehem to comply with its existing obligations:

> "As I indicated in my letter of May 27, the Commonwealth expected Bethlehem to comply in good faith with your existing legal duties which included the May 31, 1975 compliance deadline at Franklin battery No. 17. The Company's failure to comply casts some doubt upon its intentions. In view of the Department's rejection of your petitions to amend the air pollution abatement plan for the Bethlehem and Franklin batteries, you are requested to comply immediately with the obligations incorporated in the approved abatement plan. The Department will expect receipt of an application for plan approval which conforms to the approved plan for controlling pushing emissions at the Bethlehem battery No. 5 and compliance with the phase-out schedule at Franklin, *or in the alternative* acceptance of my offer in my letter of March 27, 1975, within ten days. Failure to comply with the Company's existing legal obligations will compel the Commonwealth to seek enforcement in the courts. (Letter, June 16, 1975, p. 2.)

Bethlehem replied by filing its appeal with the Environmental Hearing Board. Thereafter DER filed the *petition* seeking enforcement of those portions of the order with which Bethlehem has failed to comply. Bethlehem continues to this day to operate Battery No. 17 in Johnstown, and has made no effort to install any pushing control device at either Battery No. 5 or Battery No. 2 in Bethlehem.

H. Commonwealth Court denied Bethlehem's objections to jurisdiction on February 18 and Bethlehem filed an interlocutory appeal to the Pennsylvania Supreme Court on March 5, 1976.

I. During the course of the proceedings below, DER conducted ambient air sampling in the vicinity of

the Johnstown plant. As a result, it was found that the ambient air in areas down in from the plant contains highly elevated concentrations of known carcinogens. Based on this data, DER filed in the Commonwealth Court a motion for immediate temporary relief pursuant to Section 10(a) of the Air Pollution Control Act. In support thereof, DER alleged, *inter alia,* that the analysis of newly-gathered data with respect to concentrations of the carcinogen benzo(a) pyrene ("BaP") led to the conclusion that emissions from the Franklin coke oven batteries are causing a serious threat to the public health. This conclusion is supported by the sworn affidavit of a medical specialist in environmental health, Dr. Bertram W. Carnow, M.D. Commonwealth Court did not act on DER's motion, but rather issued a stay of all proceedings pending final disposition of Bethlehem's appeal.

J. DER moved the Pennsylvania Supreme Court for expedited handling of Bethlehem's appeal. The motion was granted. The Supreme Court issued its opinion and order within 63 days following argument. The Court affirmed the Commonwealth Court's dismissal of Bethlehem's preliminary objections holding that the Commonwealth Court had jurisdiction under the Pennsylvania Air Pollution Control Act to proceed to the merits on DER's petition for enforcement. The order of the Pennsylvania Supreme Court remanded the case to the Commonwealth Court for further proceedings.

K. Now, the stay in the Commonwealth Court has been continued pending this Court's disposition of Bethlehem's petition for certiorari. The national ambient air quality standards adopted pursuant to the Clean Air Act continue to be exceeded. The people of Johnstown re-

main without relief from a serious public health threat. DER believes that the situation is of considerable urgency and continues to deserve expedited handling by the Courts. Therefore, together with this reply to Bethlehem's petition, DER has also filed a motion for expedited disposition of Bethlehem's petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

I. Petitioner failed to explicitly set up or claim any title, right, privilege, or immunity under the constitution, treaties or statutes of the United States at any time during the proceedings in the state courts of Pennsylvania thereby precluding the invocation of this Court's jurisdiction pursuant to 28 U.S.C. §1257 (3).

This case presents no federal question. The entire proceeding to date arises out of Bethlehem's objections to jurisdiction by the Pennsylvania Commonwealth Court over DER's petition for enforcement of the duties contained in an administrative agency order consented to by Bethlehem. A true and correct copy of Bethlehem's preliminary objections is attached hereto as Appendix A. The only issues litigated to date have been limited to the theories asserted by Bethlehem as grounds for depriving the Commonwealth Court of jurisdiction over the proceeding. No federal constitutional question has ever been raised by Bethlehem at any point in the proceedings to date.

In its statement of the case at pp. 2-3 of its petition, Bethlehem admits that its objections in the state proceeding were limited to jurisdictional questions. Now, for the first time, Bethlehem claims that

> "*Inherent* and *implicit* in Bethlehem's preliminary objections is Bethlehem's contention that failure to dismiss the petition would violate Bethlehem's constitutional rights to due process of law." (Emphasis added.) Petition, at 3.

Examination of the opinion of the Supreme Court of Pennsylvania presented for review herein clearly reveals the non-federal character of the Petitioner's jurisdictional objections to the enforcement action presently pending on remand before the Commonwealth Court of Pennsylvania. These preliminary objections were founded solely on state theories of election of remedies, primary jurisdiction, and inapplicability of Section 10 (a) of Pennsylvania's Air Pollution Control Act.[1] Nowhere in the record nor in Bethlehem's application for reargument to the Pennsylvania Supreme Court does the belatedly asserted constitutional claim appear. Since no federal constitutional question was presented to any Pennsylvania Court at any time, this Court acquires no jurisdiction to review any alleged federal questions asserted now for the first time. *Whitney v. California,* 47 S.Ct. 641, 274 U.S. 357, 71 L.Ed. 1095 (1927); *Bolln v. Nebraska,* 20 S.Ct. 287, 176 U.S. 83, 44 L.Ed. 377 (1900); *Armstrong v. Treasurer of Athens County,* 41 U.S. 281, 10 L.Ed. 965 (1842); *Howard v. Fleming,* 24 S.Ct. 49, 191 U.S. 126, 48 L.Ed. 121 (1903); *Winona Land v. Minnesota,* 16 S.Ct. 88, 159 U.S. 540, 40 L.Ed. 252 (1895); *Hiawassee River Power Co. v. Carolina-Tennessee Power Co.,* 40 S.Ct. 330, 252 U.S. 341, 64 L.Ed. 601 (1920).

In *Bolln v. Nebraska,* supra, an objection that the defendant was denied due process of law in being refused a jury trial upon a plea in abatement was not raised un-

[1] Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4010(a).

til after the cause had been decided by the Supreme Court of Nebraska. Accordingly, this Court refused to consider the constitutional immunities not properly set up below nor appearing in the opinion presented for review by writ of error. The controlling principle was unequivocally articulated by the *Bolln* Court, supra, at 91:

> "We have repeatedly decided that an appeal to the jurisdiction of this Court must not be a mere afterthought, and that if any right, privilege, or immunity is asserted under the Constitution or laws of the United States it must be specifically set up and claimed before the final adjudication of the case in the court from which the appeal is sought to be maintained."

Similarly in *Hiawassee River Power Co. v. Carolina-Tennessee Power Co.*, 252 U.S. 341 (1920), a claim of invalidity under the state constitution was specifically urged and passed upon adversely to the petitioner in the state Supreme Court, but no reference was made in that connection to the Fourteenth Amendment to the Federal Constitution. Justice Brandeis aptly noted:

> "If a general statement that the ruling of the state court was against the Fourteenth Amendment were a sufficient claim of right under the Constitution to give this court jurisdiction [citation omitted], still the basis for a review by this court is wholly lacking here. For the Fourteenth Amendment was mentioned only in the trial court. In the Supreme Court of the state no mention was made of it in the assignment of errors; nor was it, so far as appears by the record, otherwise presented to or passed upon by that court. The denial of the claim was specifically set forth in the petition for the writ of error to this court and in the assignment of errors filed here, but obviously that was too late. Chicago, Indiana and Louisville Ry. Co. v. McGuire, 196 U.S. 128, 132." *Hiawassee River*, supra, at 344.

In view of this critical flaw in the alleged jurisdiction of the U.S. Supreme Court therein, the *Hiawassee* Court refused to make any further inquiry to the substance of the claim that petitioner had been deprived of due process.

This rule continues to be universally and strictly applied by the Court. Cf. *Monks v. New Jersey*, 90 S.Ct. 1563, 398 U.S. 71, 26 L.Ed. 2d 54 (1970); *Street v. New York*, 89 S.Ct. 1354, 394 U.S. 576, 22 L.Ed. 2d 572 (1969); *Pickering v. Board of Education of Township High School District 205, Will County, Ill.*, 88 S.Ct. 1731, 391 U.S. 563, 20 L.Ed. 2d 811 (1968).

Consistency with the prior constructions of the requirements of 12 U.S.C. §1257(3) mandates dismissal of the present writ for want of jurisdiction. Moreover, Petitioner's admission in its statement of the case (Petition, p. 3) that its constitutional contention was merely "*inherent* and *implicit* in Bethlehem's preliminary objections" would permit no other result under the sound principles of such precedents. The assertion of a federal claim before the highest court of the state must be made unmistakenly and cannot be left to mere inference. See *Winona Land Co. v. Minnesota*, supra (1895); *Bolln v. Nebraska*, supra (1900); and *Street v. New York*, supra (1969). Having failed to assert any federal claim below, Bethlehem has waived any opportunity it might otherwise have had to raise such a claim here.

II. Petitioner has failed to assert any claim which is within the scope of any right, privilege or immunity established by the Fourteenth Amendment of the United States Constitution.

Bethlehem contends that it has been denied due process protected by the Fourteenth Amendment on two grounds: (1) the procedure employed by the state shocks the sense of fair play, and (2) the procedure employed by the state impeded Bethlehem's open and equal access to the appellate courts. The record in this proceeding does not support either claim.

With respect to the first ground, Bethlehem claims that a sense of fair play must be shocked because DER subjected petitioner to an enforcement action which might be moot upon resolution of the pending proceedings to modify the order before the Pennsylvania Environmental Hearing Board. This contention suggests a very perverse sense of fair play, however, since it would require the public exposed to Bethlehem's carcinogens to suffer quietly while Bethlehem drags out endless litigation as a device by which it could avoid clean-up. The Pennsylvania Supreme Court was shocked by Bethlehem's sense of fair play, or the lack of any sense of fair play, and acted to protect the public health consistent with the mandates of the Legislature and Congress.

If the procedure employed by the Commonwealth in this case shocks the Court's sense of fair play, then numerous other analogous procedures should also shock the Court. For example, this case is no different than that of a party who is obliged to comply with a lower court's order while an appeal is pursued. Here the court of first

instance is DER.[2] Bethlehem presented an application to modify the order to DER. The application was carefully evaluated and rejected as being scientifically unsound and unlawful. Thereafter, Bethlehem appealed as was its right. In the meantime, however, it is being held to its earlier obligations. If such a procedure is shocking, then it should be equally shocking to require a party to comply with an injunction or decree of a court while an appeal is pending since the appeal might render the lower court decision moot. Clearly such procedures have never been considered shocking because as a rule it is assumed that courts, and agencies, act properly and within the law. Their judgments are commonly subject to enforcement unless stayed or overruled.

This case is no different. The decision of DER has been given deference by the Pennsylvania Supreme Court because the agency has the legal authority and the special experience necessary to act in the circumstances. The agency has exercised its authority responsibly and reasonably. Unless its decision is overturned in due course, it is not shocking for the courts to enforce the order which remains unchanged after DER's exercise of administrative discretion.[3]

To hold otherwise would be to hold that it is shocking whenever a court relies on the judgment of lawfully appointed agencies charged with special jurisdiction because of their expertise, and instead would require courts to defer enforcement of any duty so long as a polluter

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[2] See the Pennsylvania Supreme Court's discussion of primary jurisdiction at pp. 14a-15a of Bethlehem's petition.

[3] See Pennsylvania Supreme Court opinion, note 23, at p. 11a of Bethlehem's petition.

continued to have a claim pending which has not finally been disposed of in the appellate process. The latter rule would be truly shocking to those concerned about the public health impacts of dangerous uncontrolled air contaminants, such as the carcinogens emitted from coke ovens.

Certainly this Court cannot find the procedure in this case shocking since it follows closely the procedure contemplated by this Court in its discussion of variances in *Train v. Natural Resources Defense Counsel, Inc.*, 95 S.Ct. 1470, 421 U.S. 60, 43 L.Ed. 2d 731 (1975). There this Court clearly held that the standards in a State Implementation Plan (SIP) would remain enforceable during the pendency of any litigation by which a polluter pursued a variance under state law. This case is closely analogous in that a polluter is being required to comply with duties initially imposed as necessary for the attainment of national ambient air quality standards, while the polluter pursues appeals from the denial of plans which were rejected, in part, because they would interfere with the attainment of the national ambient air standards.

The Pennsylvania Supreme Court relied on the principle set out in *Train*, supra, and did not find it shocking to its sense of fair play.[4] Only someone shocked by the Congress' policy of swift attainment of ambient air quality standards would be shocked by the procedure followed in this case. We suggest that this Court should be shocked by Bethlehem's expectation that the Court might be shocked by the procedure employed in this case. We also

[4] See Pennsylvania Supreme Court opinion, text and note 24, p. 11a of Bethlehem's petition.

suggest that the Court should be shocked at Bethlehem's grotesque and perverse sense of fair play which gives no consideration to the rights of the public who are exposed to a significantly increased risk of premature death by cancer.

With respect to its second ground, Bethlehem claims that the procedure employed in this case has impeded Bethlehem's open and equal access to the appellate process. Such an argument is truly a fabrication which we cannot believe is made in good faith.

In both of the cases cited by Bethlehem in support of its contention, certain classes of persons were clearly discriminated against by statute with respect to their pursuit of appeals. *In Re Brown*, 439 F.2d 47 (3d Cir., 1971), involved discrimination against juveniles as compared to adults because juveniles could appeal only with leave of court whereas adults could appeal as of right. Such discrimination was held unconstitutional. In *Robinson v. Beto*, 426 F.2d 797 (5th Cir., 1970), convicted defendants could be incarcerated during the pendency of appeals without credit toward the sentence imposed. This rule was held to impede the open and equal access to appellate review because prisoners who appealed ran the risk of much longer imprisonments.

Here, Bethlehem is not discriminated against in any way. It is not part of a class deprived by statute from the same access to the courts enjoyed by others. Nor does the exercise of its right to appeal cause Bethlehem to incur any greater penalty. Bethlehem was assured the right to appeal from any adverse action by DER on its application for a modification to the order. Bethlehem has filed that appeal and has not been impeded in any respect in its pur-

suit. It might have been different if DER has refused to act on Bethlehem's application, but that is not the case here.

It should be noted in this regard that Bethlehem has twice requested continuances on its appeal to the Environmental Hearing Board, once in January, 1976 when the matter was scheduled for hearing, and again in August, 1976, when the continued hearing began. At no time since August has Bethlehem moved that the hearing be resumed. Bethlehem has been completely free and unfettered in pursuing its litigation strategy. No action of the state, and certainly not the Supreme Court opinion and order here at issue, has in any way impeded Bethlehem's pursuit of whatever relief may be available through the appeal route it has chosen.

With respect to both grounds for its claim, Bethlehem has not, nor can it on the face of this record, show that it has in any way suffered an infringement of the rights or immunities protected through the Fourteenth Amendment. Bethlehem cannot honestly contend that it falls within either rule cited in its petition. Certainly Bethlehem is not in a posture in any way similar to the claimants in the cases cited in its peititon. DER, therefore, contends that, since Bethlehem has failed to show any circumstances in this case whereby the procedures employed offend protected rights or immunities, then Bethlehem's petition should be dismissed for want of a substantial federal question.

CONCLUSION

Respondent, DER, contends that Bethlehem's petition for writ of certiorari should be denied because (1) no federal question was raised by Bethlehem at any time during the proceedings before the Pennsylvania Supreme Court or the Pennsylvania Commonwealth Court, and (2) Bethlehem raises no substantial federal question within the scope of the rights and immunities protected by the Fourteenth Amendment of the United States Constitution.

Respectfully submitted,

ROBERT E. YUHNKE
Counsel for Respondent, Commonwealth of Pennsylvania Department of Environmental Resources

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APPENDIX A

COMMONWEALTH COURT OF PENNSYLVANIA

No. 1054 C.D. 1975

Commonwealth of Pennsylvania, Department of Environmental Resources,

Petitioner

v.

Bethlehem Steel Corporation, et al.,

Respondents

RESPONDENTS' PRELIMINARY OBJECTIONS TO THE DER'S PETITION FOR ENFORCEMENT OF AN ADMINISTRATIVE ORDER

Respondents Bethlehem Steel Corporation, Lewis W. Foy, its Chairman, and Thomas N. Crowley and Harold F. Miller, General Managers of its Johnstown and Bethlehem, Pennsylvania Plants, respectively,* file the following preliminary objections to the petition of the Commonwealth of Pennsylvania, Department of Environmental Resources (hereinafter the "DER"):

*The named respondents are referred to collectively hereinafter as "Bethlehem".

A. A motion to strike the individual respondents from this action because the DER's attempt to include them herein is not in conformity to law and constitutes scandalous and impertinent matter;

B. A petition raising a question of jurisdiction;

C. A demurrer;

D. Pendency of this very matter before the Environmental Hearing Board ("EHB")—"lis pendens";

E. That primary jurisdiction of this matter is in the EHB;

F. That the DER has failed to exhaust the administrative proceedings pending before the EHB;

G. That the DER's petition is not ripe for review in this Court because of the pendency of the matters involved herein before the EHB.

In support of these preliminary objections, Bethlehem represents as follows:

1. At the threshold, Bethlehem moves to strike the individual respondents, its Chairman and the General Managers of its Johnstown and Bethlehem Plants, from this action because the DER's attempt to include them herein is not in conformity to law and constitutes scandalous and impertinent matter. There is no authority whatsoever under the Air Pollution Control Act of this Commonwealth, under which the DER has filed this petition, which would justify the DER's attempt thus to harass and intimidate these persons. Accordingly, Bethlehem re-

spectfully submits that that portion of the DER's petition purporting to include them herein must be stricken under Rule 1017 (b) (2) of the Pennsylvania Rules of Civil Procedure.

2. With respect to the substantive allegations of the petition, the DER's original February 25, 1972 Air Pollution Abatement Order No. 72-533 which is the subject of this proceeding (Exhibit 1 to the DER's petition), as implemented by Bethlehem's DER-approved Air Pollution Abatement Plans of June 29, 1973 (Exhibits 2A and 2B to the Petition) contemplated, among other things, that Franklin Coke Oven Battery No. 17 at the Johnstown Plant would be taken out of operation by May 31, 1975 and that Bethlehem would submit an application for a permit to construct equipment to control pushing emissions at Coke Oven Battery No. 5 at the Bethlehem Plant by March 1, 1975. Order No. 72-533 expressly granted Bethlehem the right to apply to the DER for modification of the order and of the plans and schedules submitted and approved thereunder, in accordance with paragraph 9 thereof which provides as follows:

> "9. Upon application of Bethlehem Steel Corporation the provisions of this order, and plans and schedules submitted and approved hereunder, may be modified by the Department, when
>
> A. delivery or installation of equipment is delayed by events not in the control of Bethlehem Steel Corporation;
>
> B. revision of the plans and schedules submitted or approved is necessary to incorporate changes in technology or corporate planning to achieve with-

> in the time specified in paragraph 5 hereof, significant improvement in air pollution control; or
>
> C. air pollution control standards applicable to the by-product, slot-type coke ovens are changed. *Any order, decision or other action taken by the Department upon such application may be appealed to the Environmental Hearing Board and the courts of the Commonwealth as provided by law.*" (Emphasis supplied.)

3. Acting pursuant to paragraph 9 of Order No. 72-533, on September 17, 1973 Bethlehem submitted an application for amendment to the Air Pollution Abatement Plan applicable to Franklin Coke Oven Battery No. 17 at the Johnstown Plant. In that proposed amendment Bethlehem requested an enlargement of the time within which it would be required to terminate operation of that Battery. The DER did not take action on this request until February 18, 1975 when it denied the request by letter. Pursuant to the terms of paragraph 9 of Order No. 72-533, Bethlehem filed a timely appeal from that denial to the EHB at EHB Docket No. 75-070-D. The Franklin Coke Oven Battery aspect of that appeal has since been dismissed on stipulation of the parties, as more fully described in paragraph 6 hereof, but other aspects of that appeal are still pending before the EHB and the parties have been engaged in extensive discovery in that proceeding.

4. Bethlehem's original Air Pollution Abatement Plan of June 29, 1973 had contemplated the termination of integrated steelmaking operations at the Johnstown Plant and the consequent termination of the operation of the Franklin Coke Oven Batteries at that Plant. There-

after, however, Bethlehem pursued ongoing extensive corporate planning studies of its various production facilities, including those at its Johnstown Plant. As a result of such studies, Bethlehem adopted a change in corporate planning to replace the existing steelmaking facilities at its Johnstown Plant with a modern Basic Oxygen Furnace which necessitated the continued operation of the Franklin Coke Oven Batteries. Bethlehem announced that decision on May 6, 1974; shortly thereafter Bethlehem and the DER entered into negotiations contemplating the resolution of all outstanding air pollution control matters pending between them.

5. With respect to the Coke Oven Batteries at its plant in Bethlehem, Pennsylvania, Bethlehem's original Air Pollution Abatement Plan of June 29, 1973 provided, in part, that an application for a permit to construct equipment to control pushing emissions at Coke Oven Battery No. 5 would be submitted to the DER by March 1, 1975. In the light of the extensive and protracted negotiations referred to in paragraph 4 hereof, however, Bethlehem requested an enlargement of the time within which to submit that application. Although that request was ultimately denied in late February or early March 1975, the parties continued their efforts amicably to resolve all outstanding air pollution control matters.

6. After further negotiations in March and April 1975, by letter dated May 13, 1975 which was delivered to the DER on May 15, 1975, Bethlehem submitted to the DER proposed modifications of its original Air Pollution Abatement Plan for the Coke Oven Batteries at the Johnstown (Franklin) and Bethlehem Plants. In essence, these proposed modifications contemplated continued operation of the Coke Oven Batteries at both plants with proposed pollution control systems. Inasmuch as this proposed amendment superseded Bethlehem's September 17, 1973 request for enlargement of the time for continuing the operation of Franklin Coke Oven Battery No. 17, which had been denied by the DER, the parties stipulated to a dismissal of Bethlehem's appeal from that denial at EHB Docket No. 75-070-D insofar as that appeal affected the Abatement Plan for the Franklin Coke Oven Batteries. Significantly, the final paragraph of that Stipulation (paragraph 3) provides that:

> "3. The parties understand that the filing of this Stipulation and the entry of the Order requested herein shall not adversely affect the rights of the parties to make such decisions, take such actions or appeals, or file such motions as are authorized by law with respect to the proposed control plan amendments submitted to the Department on May 15, 1975."

On June 3, 1975 the EHB issued an order confirming the dismissal of that part of the appeal.

7. By letter dated June 16, 1975, the DER denied Bethlehem's requests for modification of the Abatement Plan for the Franklin and Bethlehem Coke Oven Batteries. On June 27, 1975, pursuant to paragraph 9 of Order No. 72-533, Bethlehem filed timely appeals from those denials to the EHB; the appeal concerning the proposed amendment to the Air Pollution Abatement Plan for the Bethlehem Plant is pending at EHB Docket No. 75-154-D and the appeal concerning the Johnstown Plant is pending at EHB Docket No. 75-155-D.

8. Notwithstanding the pendency of these proceedings before the EHB, and in defiance thereof and of the terms of its own order providing for initial review of any proposed modification of the Abatement Plan by appeal to the EHB, on or about July 25, 1975 the DER attempted to bypass administrative review by the EHB completely by filing the instant petition in this Court.

9. In the light of the foregoing undisputed history of these proceedings, Bethlehem respectfully submits that the DER is precluded from thus attempting to invoke the jurisdiction of this Court at this juncture of these proceedings. By the very terms of its own Order No. 72-533, the DER has acknowledged expressly Bethlehem's right to request modification of the original Abatement Plan and, upon the denial of that request by the DER, to appeal that denial "to the Environmental Hearing Board and the court of the Commonwealth" (paragraph 9 of Order No. 72-533). Pursuant to that unequivocal stipulation of the parties, Bethlehem has appealed the DER's denial of its May 15, 1975 requests to the EHB. Moreover, since the filing of these appeals the DER itself has initiated and is pursuing extensive discovery before the EHB in those proceedings. Thus, the DER is wholly foreclosed from invoking the jurisdiction of this Court by the very statute under which it purports to have filed this petition, which authorizes only the filing of a petition to enforce an order *"from which no timely appeal has been taken or which has been sustained on appeal"* (emphasis supplied). Section 10(a) of the Air Pollution Control Act, 35 P.S. §4010(a).

10. In these circumstances, the DER's petition must be dismissed under Rule 1017(b)(1) of the Pennsylvania Rules of Civil Procedure on jurisdictional grounds, under

Rule 1017(b)(4) because it is subject to demurrer, and under Rule 1017(b)(5) because of the pendency of these proceedings before the EHB. Further, whether the doctrines of primary jurisdiction, exhaustion of administrative proceedings and ripeness for review are considered to be preliminary objections raising questions of jurisdiction, pendency of a prior action, or both, it is obvious that they too compel the dismissal of the DER's petition—as a matter of law, this Court must first have the benefit of the EHB's decision in those proceedings before being requested to pass judgment thereon. Further, the issues which the DER attempts to raise in its petition to this Court may well be mooted by those proceedings. These considerations thus further compel the dismissal of the instant petition.

WHEREFORE, Bethlehem requests the Court to strike the individual respondents from this proceeding and to dismiss the DER's petition for enforcement without prejudice to the right of either the DER or Bethlehem to appeal from the EHB's adjudication in the proceedings pending at its Docket Nos. 75-154-D and 75-155-D.

BLAIR S. MCMILLIN
PAUL A. MANION
ROBERT M. WALTER
REED SMITH SHAW & MCCLAY
(s) PAUL A. MANION
Counsel for Respondents

REED SMITH SHAW & MCCLAY
P. O. Box 2009
747 Union Trust Building
Pittsburgh, Pa. 15219
(A.C. 412—288-3236)
Date: September 19, 1975

AFFIDAVIT

Commonwealth of Pennsylvania,
County of Lehigh, ss:

David M. Anderson, being duly sworn according to law, deposes and says that he is Manager, Environmental Quality Control Division, Industrial Relations Department of Bethlehem Steel Corporation; that he is authorized to execute this affidavit on behalf of the respondents in the foregoing action; and that the averments of fact set forth in the foregoing preliminary objections are true and correct, in part upon the basis of his personal knowledge, in part upon the basis of facts alleged in the DER's own Petition for Enforcement of Administrative Order and the exhibits attached thereto, in part upon the basis of the business records of Bethlehem Steel Corporation, and in part upon the basis of information which he believes to be true.

(s) David M. Anderson

SWORN TO AND SUBSCRIBED before me this 17th day of September, 1975.

(s) [Illegible]
Notary Public

My Commisison Expires: July 17, 1978

City of Bethlehem
Lehigh County